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IN THE

Supreme Court of The United States

OCTOBER TERM, 1972

No. 72-493

JOHN W. VLANDIS, Director of Admission,
The University of Connecticut,
Appellant,

vs.

MARGARET MARSH KLINE and
PATRICIA CATAPANO,
Appellees.

On Appeal From the United States District Court for the District of Connecticut

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE,* AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, the American Civil Liberties Union of Ohio, Inc. respectfully moves for leave to file a brief *amicus curiae* in the above entitled case. Counsel for appellant has not replied to movant's letter requesting consent; the appellees have granted their consent.*

* The letter of consent has been filed with the Clerk of the Court. Last week, counsel for *amicus curiae* received a request from the appellant's attorney to notify him of the type of argument *amicus* would present. Although we immediately complied with the request, *amicus* has not yet received a letter of consent. Should one be forthcoming, it will be filed with the Clerk.

The American Civil Liberties Union of Ohio, Inc. is a non-profit, non-partisan organization dedicated to the defense of civil liberties, and in particular, those constitutional liberties guaranteed in the Bill of Rights and the Fourteenth Amendment. Among the rights that the Union has defended during its fifty-plus years of existence are the right to travel, the right to an education and due process of law at the administrative level. As is demonstrated by the statute and regulations in the appendix to this brief commencing at p. 1a, Ohio presently employs standards and procedures for determining residence for tuition purposes similar to those employed by Connecticut. The Union agrees with the District Court of Connecticut that these standards and procedures violate constitutional requirements.

Because the issues before this Court in the instant case are closely related to issues which involve the residents of Ohio,[1] the *amicus curiae* respectfully prays leave to file the attached brief.

Respectfully submitted,
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February, 1973

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[1] *See Kelm v. Carlson*, No. 72-1241 (6th Cir. February 8, 1973).

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

The interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra.*

THE QUESTION PRESENTED

Whether state educational institutes may discriminate between residents by imposing higher tuition rates upon newly arrived resident students than they impose on other resident students.

ARGUMENT

A Public Institution of Higher Learning Cannot Use a Durational Residency Requirement to Discriminate Among Residents When Assessing Fees.

A. *Introduction*

The court below found that it is impermissible for the University of Connecticut to adopt an irrebuttable presumption of non-residency which precludes "out of state" students from ever qualifying for resident tuition rates. *Kline v. Vlandis*, 346 F. Supp. 526 (D. Conn. 1972)[1] On appeal, the validity of not only the conclusive presumption, but of the whole non-resident tuition fee structure will be in issue.[2] Accordingly, the Court will be called upon to re-examine its affirmance without opinion of *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 905 (1971).[3]

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[1] *Accord, Kelm v. Carlson*, No. 72-1241 (6th Cir. February 8, 1973) (the Sixth Circuit adopted *Kline* as "both applicable to the case [before the court] and persuasive." id at p. 6 (slip opinion)).

[2] There are at least three contexts in which non-resident tuition causes constitutional difficulties. First, the validity of state institutions of higher learning charging "non-resident" students tuition fees greater than they charge their "residents" is subject to considerable doubt. Since the plaintiffs in this case are conceded to be residents, this problem is not posed in the context of this case. Second, the waiting period requirement that the student not only be domiciled in the state on the date of registration but also be so domiciled for one year prior to that date creates a substantial difficulty. Finally, of course, the irrebuttable presumption presented here is in all likelihood constitutionally infirm. *See generally* Note, *The Constitutionality of Non-resident Tuition*, 55 MINN. L. REV. 1139 (1970).

[3] The State of Washington in its *amicus curiae* brief suggests that this case does not present the question of the legitimacy of a one year durational residency requirement because the Connecticut statute's permanent classification is distinguishable from the type of requirement found in *Starns v. Malkerson*, 326 F.Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). Brief of *Amicus Curiae* State of Washington at p. 7. However, the court below did not enjoin solely the use of the irrebuttable presumption; it also enjoined from enforcement Conn. Gen. Stats. §10-329b(a)(2), as amended, a durational residency requirement. Thus, it would seem that the Court must decide whether a state can require a *resident* to wait one year before qualifying for the resident rate.

Although both the second and third proposition set forth in note 2 *supra* are presented to the Court within the framework of this case, *amicus curiae* will restrict its argument to the legality of the durational residency requirement since unquestionably *Carrington v. Rash*, 380 U.S. 89 (1965), is dispositive of the constitutionality of the conclusive presumption.

Starns involved the constitutionality of a Minnesota tuition regulation of the durational residency type. In holding the regulation permissible, the district court misapprehended this Court's opinion in *Shapiro v. Thompson,* 394 U.S. 618 (1969), and reached a decision which, as will be shown, is not reasonably supported in logic and is contrary to legal authority. *See* Note, 24 ALA. L. REV. 147, 151-52, 162 (1971).[4]

B. *Any state scheme of statutory classification of persons which impedes the fundamental right to travel can only be sustained against an equal protection challenge if it meets the "compelling state interest" test.*

Over 100 years ago, this Court recognized that imbedded within the Constitution is the right of a citizen to pass and repass through every part of the country without interruption. *The Passenger Cases,* 48 U.S. (7 How.) 282, 491-92 (1949) (Taney, C. J., dissenting).[5]

[4] It would be presumptuous of counsel to try to tell this Court why it affirmed *Starns.* However, it should be pointed out that *Starns* was affirmed without benefit of oral argument and before this Court's decision in *Dunn v. Blumstein,* 405 U.S. 330, (1972). To the extent that the Court feels that *Dunn* is not controlling, the Court should overrule *Starns.* As will be demonstrated, *Starns* is an illogical and confusing intepretation of *Shapiro* and conflicts with the current concept of the right to travel as presented in *Dunn.*

[5] The right to travel finds no explicit mention in the Constitution although it has often been suggested that it is absent because the right is so obviously elementary to a federal union. *E.g., United States v. Guest,* 383 U.S. 745, 758(1966); *see generally* Note, *Shapiro v. Thompson: Travel, Welfare and the Constitution,* 44 N.Y.U. L. REV. 989, 990-93 (1969). The right has been attributed to the privileges and immunities clause of Article IV, §2. *Ward v. Maryland,* 79 U.S.(12 Wall) 418, 430 (1870). It has also been found in the privileges and immunities clause of the Fourteenth Amendment, *Edwards v. California,* 314 U.S. 160, 178(1941) (Douglas, J. concurring); *The Slaughter-House Cases,* 83 U.S.(16 Wall.) 36, 79(1872), the Commerce Clause, *United States v. Guest, supra* at 758-59, and within the due process clause of the Fifth Amendment. *Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964). *See also Shapiro v. Thompson,* 394 U.S. 618, 630n.8(1969); *United States v. Guest, supra* at 762-71 (Harlan, J., concurring in part, dissenting in part).

More recently, the right to travel was articulated by the Court in *Shapiro v. Thompson,* 394 U.S. 618 (1969), and *Dunn v. Blumstein,* 405 U.S. 303, (1972) The former decision held that state residence requirements which prohibited welfare payments to residents who had not lived in the state for a minimum of one year created a classification which denied them the equal protection of the laws. 394 U.S. at 627. The latter decision struck down as unconstitutional a durational residency requirement which created two classes of residents for voting purposes; residents who had lived in the state for at least a year and could vote, and those who were residents less than a year and could not. 405 U.S. at 334. Both decisions underscore the Court's recognition of the right to travel as an independent and fundamental constitutional guarantee. 394 U.S. at 629; 405 U.S. at 338-39.

State statutes infringing upon a fundamental constitutional right will be scrutinized strictly. *E.g., Harper v. Virginia Board of Elections,* 383 U.S. 663, 669-70 (1966). When fundamental rights are involved even a rational relationship between the particular statute and a permissible legislative goal of the state will not suffice to uphold the legislation. Instead, the presumption of constitutionality normally accorded state enactments is reversed, R. B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 MICH. L. REV. 645, 666-67 (1963), and the law will stand only if the state can demonstrate a *substantial* and *compelling* governmental interest for imposing the restriction in question. *Dunn v. Blumstein,* 405 U.S. at 335; *Shapiro v. Thompson,* 394 U.S. at 634. The right to travel having been repeatedly recognized as a fundamental constitutional right, *Shapiro, Dunn* and the compelling state interest test must control this case.

While this Court had occasion to affirm a decision which rejected the application of the compelling state interest test to a regulation imposing a one-year durational residency requirement for tuition purposes, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd,* 401 U.S. 985(1971), the Court's recent opinion in *Dunn* seems to place the viability of *Starns* in considerable doubt. In *Starns,* the district court spurned the compelling state interest test and opted for the rational basis test to examine the validity of a durational residency requirement for tuition purposes. The court rationalized its choice of which equal protection standard to use by holding that in *Shapiro* this Court found, "based on weighty evidence", that the welfare regulations had as one of their specific purposes the exclusion of the poor from the state. According to Judge Lord writing for the district court panel, there were no facts before the court disclosing that the waiting period for resident tuition purposes had as a *specific objective* excluding out of state students nor was there a basis to conclude that the operation of the one year waiting period had an unconstitutional "chilling effect" on the constitutional right to travel. 326 F. Supp. at 237-38. Thus, the district court avoided the clear command of *Shapiro* by finding that the durational residency requirement for tuition did not abridge any fundamental constitutional right.

This is the same argument attempted by the State of Tennessee in *Dunn* and rejected by the Court as untenable. 405 U.S. at 339-42. Under *Dunn,* actual proof of whether the regulations deter students from entering the state is unnecessary. Indeed, this Court found that the view that *Shapiro* requires a showing of actual deterrance represents a fundamental misunderstanding of the law and concluded that:

> "*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In *Shapiro*, we explicitly stated that the compelling state interest test would be triggered by 'any classification which serves to *penalize* the exercise of that right (to travel) . . .' *id.* at 634." *Dunn v. Blumstein*, 405 U.S. at 339-40.

Without exception durational residence laws impermissibly hinder and penalize the right to travel by imposing their restrictions only on those who exercise their fundamental right to travel and change residence. *id.* at 342. If a residence requirement for voting is a penalty on travel, then it is difficult to see how such a requirement conditioning eligibility for in-state tuition could be any less of a penalty.

In sum, the University of Connecticut cannot bootstrap its way by using *Starns*, a case based on a postulate which this Court has disavowed. The University must support its non-resident student fee by showing the state has a compelling state interest or it cannot support it at all. "Absent a compelling state interest, a State may not burden the right to travel in this way." 405 U.S. at 342.

C. *Durational residence requirements for Tuition purposes do not further any substantial state interest.*

Two purposes have been advanced as justification for the tuition waiting period: cost equalization and proof of domiciliary intent. Comment, *The Constitutionality of Nonresident Tuition*, 55 MINN. L. REV. 1139, 1156(1971). Additionally, the tuition waiting period may have behind it the explicit purpose of deterring migration into the

state, although, since this Court rejected such a purpose as impermissible in *Shapiro*, 394 U.S. at 629, it will rarely, if ever, be articulated.[6]

The cost equalization rationale was fully articulated in *Kirk v. Board of Regents*, 273 Cal.App.2d 430, 78 Cal. Rptr. 260 (Dist. Ct. App. 1969). The California court believed that "[t]he higher tuition charged nonresident students tends to distribute more evenly the cost of operating and supporting the University of California between residents and nonresidents attending the university." *id* at 444; 78 Cal. Rptr. at 269.

To begin with, it is hard to accept this rationale even under the rational basis test since this conclusion confuses the issue: Although it may be proper to distinguish between resident and non-resident students in order to equalize cost, it is highly improper to have two classes of residents paying different rates based upon their past tax contribution. *Shapiro* expressly prohibits a state from apportioning "*all* benefits and services according to the past tax contributions of its citizens." 394 U.S. at 632-33. Emphasis added.

Additionally, the cost equalization theory fails because it is based on a faulty assumption. The "old" citizens of a state do not contribute the bulk of the financial needs of higher education through payment of their state taxes. Although state tax support continues to rise in actual dollar amount, it is steadily decreasing

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[6] There are indications that deterrence of out of state students is one of the specific reasons for the higher tuition rates charged out of state students. A recent law review article points out that, according to the *New York Times*, August 31, 1969, p. 32, Cols. 1, 2, universities are taking steps to limit the number of enrollees from outside their state borders. One of the measures taken is increasing non-resident tuition. Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134, 152-53 (1971).

as a percentage of the total financing of higher education. N.P. Auburn, *Tax Support*, 30 PROCEEDINGS, ACADEMY OF POLITICAL SCIENCE 94, 95(1970). Today, while allocations of state monies cover a vital part of the institutional budget, they constitute an average of only about 27% of the operating budget for educational purposes. By 1980, it is expected to fall to 22% as more and more of the burden of higher education is assumed by the students and by the federal government. H. R. Bowen, *Financial Needs of the Campus*, 30 PROCEEDINGS, ACADEMY OF POLITICAL SCIENCE 75, 92 (1970).[7] If the historical pattern continues, students will contribute almost one-fourth of the cost of their education, the state and federal government will each account for approximately 25% of the cost and the remainder will come from non-public sources. Hence, it may be fair to state that by charging higher out-of-state tuition rates, the state is not asking the "out of state" resident to equalize the cost but is asking him to help finance the education of the "in-state" resident student. As the percentage of student financing grows, the truer this becomes.

The other purpose—proof of domiciliary intent—was also repudiated by this Court in *Dunn*. 405 U.S. at 345-54. The Court recognized that the waiting period was no more than an irrebutable presumption that could not be disputed regardless of the amount of objective indicia of true residency one might present to prove that he is a bona fide resident. The Court had previously considered and rejected a similar kind of irrebutable presumption in *Carrington v. Rash*, 380 U.S. 89, 95(1965).

The state may have a legitimate concern in making sure that the people to whom it grants resident tuition

[7] A table demonstrating the sources of income to higher education is reproduced in the appendix to this brief at p. 4a.

status are bona fide residents and a durational residence requirement may, in a crude way, accomplish that purpose.

> "But it also excludes many residents. Given the state's legitimate purpose and the individual interests which are affected, the classification is all too imprecise." 92 S.Ct. at 1007.

This is especially true since, as the *Dunn* Court noted, it is not very difficult for a state to determine on an individualized basis whether one recently arrived in the community is in fact a resident. *id.* at 348. For instance, the state could easily determine whether the new arrival has obtained a dwelling, car registration, driver's license or voting registration. *See, id.* at 348. All demonstrate an intention to stay indefinitely in a place.

CONCLUSION

For the reasons set forth herein, the decision below should be affirmed.

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